

1 SOLOMON E. GRESEN [SBN: 164783]  
JOSEPH M LEVY [SBN: 230467]  
2 **LAW OFFICES OF RHEUBAN & GRESEN**  
15910 VENTURA BOULEVARD, SUITE 1610  
3 ENCINO, CALIFORNIA 91436  
TELEPHONE: (818) 815-2727  
4 FACSIMILE: (818) 815-2737

5 Attorneys for Plaintiff, Cindy Guillen-Gomez  
6  
7

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
9 FOR THE COUNTY OF LOS ANGELES  
10

11 OMAR RODRIGUEZ; CINDY GUILLEN-  
GOMEZ; STEVE KARAGIOSIAN;  
12 ELFEGO RODRIGUEZ; AND JAMAL  
CHILDS,

13 Plaintiffs,  
14

15 -vs-

16 BURBANK POLICE DEPARTMENT; CITY  
OF BURBANK; AND DOES 1 THROUGH  
17 100, INCLUSIVE.

18 Defendants.  
19

20 BURBANK POLICE DEPARTMENT; CITY  
OF BURBANK,

21 Cross-Complainants,  
22

23 -vs-

24 OMAR RODRIGUEZ, and Individual,

25 Cross- Defendant.  
26  
27  
28

CASE NO.: BC 414 602

Assigned to: Hon. Joanne B. O'Donnell, Judge  
Dept. 37

Complaint Filed: May 28, 2009

PLAINTIFF'S OPPOSITION TO  
DEFENDANT'S RENEWED MOTION *IN*  
*LIMINE* NO. 6 TO EXCLUDE TESTIMONY  
OF OLIVER "LEE" DRUMMOND

TRIAL:

DATE: August 31, 2011  
TIME: 9:00 a.m.  
DEPT: 37

1                                   **MEMORANDUM OF POINTS AND AUTHORITIES**

2           In Defendant's so-called renewed Motion in Limine No. 6, Defendant seeks an order barring  
3 any testimony from Plaintiff's expert witness on police department policies, practices, procedures  
4 and training, Oliver "Lee" Drummond. Defendant does not challenge Drummond's qualifications as  
5 an expert on these topics, but seeks to exclude all testimony from him on the grounds that such  
6 testimony would not be sufficiently beyond common experience and would have no probative value.

7           Defendant relies on *Kotla v. Regents of University of California* (2004) 115 Cal. App. 4<sup>th</sup>  
8 283. However, in *Kotla* the court held only that the trial court erred in permitting a human resources  
9 expert to offer opinion testimony about whether certain facts were "indicators" of a retaliation. The  
10 court held that a human resources expert may testify on a number of different issues, stating:

11           We fashion no general rule here precluding the use of human resources experts in  
12 employment cases. We are concerned solely with Dr. Finkelman's testimony that the facts in  
13 evidence were indicators of or had a tendency to show retaliation. Expert testimony on  
14 predicate issues within the expertise of a human resources expert is clearly permissible. For  
15 example, evidence showing (or negating) that an employee's discharge was grossly  
16 disproportionate to punishments meted out to similarly situated employees, or that the  
17 employer significantly deviated from its ordinary personnel procedures in the aggrieved  
18 employee's case, might well be relevant to support (or negate) an inference of retaliation.  
19 Opinion testimony on these subjects by a qualified expert on human resources management  
20 might well assist the jury in its factfinding.

21           (*Kotla v. Regents of University of California* (2004) 115 Cal. App. 4<sup>th</sup> 283, 294, Fn.6.)

22           Thus, under *Kotla, supra*, Drummond should be allowed to testify on predicate issues. It  
23 would be an abuse of discretion, therefore, to exclude his testimony entirely.

24           In *Forbes v. ABM Indus.*, 2005 Wash. App. LEXIS 696, (Wash. Ct. App. Apr. 21,  
25 2005), the court held that the limitation on an expert's testimony in *Kotla, supra*, does not apply  
26 where an expert identifies seemingly non-discriminatory acts that, when viewed globally, could  
27 indicate a pattern of discrimination. The court explained:

28           Moreover, unlike the expert in *Kotla*, Dr. Aamodt was helpful to the jury because he

1 identified seemingly non-discriminatory acts by an employer that, when viewed globally,  
2 could indicate a pattern of discrimination. Dr. Aamodt opined that undercutting authority and  
3 reassigning responsibilities could signal an attempt on an employer's part to build a  
4 non-discriminatory case for termination when the true basis was discriminatory. Relevant  
5 here, is if the employer uses such tactics with female employees, but not with male  
6 employees, the practice could imply a discriminatory intent on the part of the employer.  
7 (*Forbes v. ABM Indus.*, 2005 Wash. App. LEXIS 696, 34-35 (Wash. Ct. App. Apr. 21, 2005))

8 Thus, in the case at bar, Drummond should be allowed to "identify seemingly  
9 non-discriminatory acts by Defendant that, when viewed globally, could indicate a pattern of  
10 discrimination."

11 In *PM Group, Inc. v. Stewart* (2007) 154 Cal. App. 4th 55, the court held that it was  
12 appropriate for an expert to testify about the custom and practices of the entertainment industry. The  
13 court stated:

14 The record reveals Sloane's testimony related primarily to the customs and practices of the  
15 entertainment industry, specifically, the music concert business. Because these customs and  
16 practices are sufficiently beyond common experience, Sloane's expert opinion was admissible  
17 to assist the trier of fact. *Marx & Co., Inc. v. The Diners' Club, Inc.* (2d Cir. 1977) 550 F.2d  
18 505, 508-509 [securities business]; *Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 924  
19 [148 Cal. Rptr. 389, 582 P.2d 980] [attorney properly could opine whether an insurance  
20 company acted in bad faith]; Evid. Code, § 801.)

21 (*PM Group, Inc. v. Stewart* (2007) 154 Cal. App. 4th 55, 63-64.)

22 Likewise, in the case at bar, Drummond should be allowed to testify regarding police  
23 department customs and practices – subjects that are beyond common experience.

24 In *PM Group, supra*, the court also held that "[t]estimony in the form of an opinion that is  
25 otherwise admissible is not objectionable because it embraces the ultimate issue to be decided by the  
26 trier of fact." (*Id.*)

27 In *Sitter v. Ascent Healthcare Solutions, Inc.*, 2011 U.S. Dist. LEXIS 73849, 2-3 (N.D. Cal.  
28 July 8, 2011), the court noted that "numerous courts have permitted extensive testimony by human

resources experts," stating:

Under Federal Rule of Evidence 704, "testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." Fed. R. Evid. 704. Accordingly, **numerous courts have permitted extensive testimony by human resources experts.** See, e.g., *Hernandez v. City of Vancouver*, No. C04-5539 FDB, 2009 U.S. Dist. LEXIS 13020, at \*11 (W.D. Wash. Feb. 5, 2009) (stating that "**Plaintiff's expert may testify about the City's deviation from good human resources practices under Rule 702**"; adding that the expert may not testify that "Defendants' failure to comply with good human resources practices is indicative of discrimination" but only because that specific testimony "is unlikely to assist the jury and runs the risk that the jury will pay unwarranted deference to [the expert's] expertise"); *Nieto v. Kapoor*, No. CIV 96-1225 MV/JHG, 1998 U.S. Dist. LEXIS 22490, at \*29-30 (D.N.M. Sept. 18, 1998) (**allowing human resources expert to testify that "[d]efendants' conduct was deficient compared to societal norms" — e.g., that "[d]efendants both should have investigated [p]laintiffs' allegations and were remiss in not disciplining [d]efendant Kapoor or in not taking corrective action despite the warnings of various employees" — and that "[d]efendants' actions contributed to the creation of a hostile environment and caused the constructive discharge of Plaintiffs, with the caveat that the Court may instruct the jury on the elements of constructive discharge at an appropriate point in [the expert's] testimony**").

(*Sitter v. Ascent Healthcare Solutions, Inc.*, 2011 U.S. Dist. LEXIS 73849, 2-3 (N.D. Cal. July 8, 2011).)

In general, Drummond will testify regarding common police department policies, customs and practices. Comm police department policies, customs and practices are beyond common knowledge. Thus, under *PM Group, supra*, and the other cases discussed above, such testimony should be allowed. Specifically, Drummond should be allowed to testify as follows:

**A. Failure to Act:**

1. Under the Police Officer Standards and Training ("POST") and the Burbank Police

1 Departments ("BPD") own Investigation Policy, the BPD has a duty to investigate allegations of  
2 discrimination and harassment, and to take corrective action when warranted.

3 3. What the BPD's investigatory obligations are under POST and its own Investigation  
4 Policy, why these obligations are necessary and how they are used in police department common  
5 practice;

6 4. What common police department customs and practices exist for making sure POST  
7 and a department's own Investigative Policy are put into effect;

8 5. That the evidence shows that the BPD failed to comply with common customs and  
9 practices to make sure that POST and its own Investigation Policy are put into effect; and

10 6. That the evidence shows that the BPD failed to meet its obligations under POST and its  
11 own Investigation Policy, and how it failed to meet those obligations.

12 POST and Police department customs and practices are beyond common knowledge. Thus,  
13 under *PM Group, supra*, and the other cases discussed herein, the above testimony should be  
14 allowed.

#### 15 **B. Failure to Train**

16 1. The BPD has a duty to train its employees regarding the proper method of performing  
17 an investigation, what that proper procedures are, and that the BPD failed to meet its obligations to  
18 properly train its employees regarding those procedures.

19 2. The BPD has a duty to train its employees regarding sexual harassment, the details as to  
20 what this duty requires, and that the BPD failed to meets its duty to properly train its employees  
21 regarding sexual harassment.

22 3. What common police department customs and practices exist for making sure  
23 employees are trained regarding sexual harassment and the proper method of performing an  
24 investigation;

25 4. That the BPD failed to follow common police department customs and practices for  
26 ensuring that its employees are properly trained regarding harassment and the proper method of  
27 performing an investigation.

28 Police department customs and practices are beyond common knowledge. Thus, under *PM*

1 *Group, supra*, and the other cases discussed herein, the above testimony should be allowed.

2 **C. Failure to Maintain Good Order and Discipline**

3 1. That order and discipline are extremely important in a paramilitary organization like the  
4 BPD,

5 2. The reasons why order and discipline are important,

6 3. What common police department customs and practices exist regarding maintaining  
7 good order and discipline,

8 4. How the BPD failed to comply with common police department customs and practices  
9 regarding maintaining good order and discipline,

10 5. How common police department customs and practices for maintaining good order and  
11 discipline prevent discrimination and harassment from happening;

12 6. How the BPD's failure to follow common police department customs and practices for  
13 maintaining good order and discipline led to harassment and discrimination.

14 Police department customs and practices are beyond common knowledge. Thus, under *PM*  
15 *Group, supra*, and the other cases discussed herein, the above testimony should be allowed.

16 **D. Sexual Harassment**

17 1. That, under POST, certain conduct is prohibited;

18 2. That certain BPD policies were consistent with POST, and were therefore appropriate;

19 3. That certain BPD policies were inconsistent with POST, and were therefore  
20 inappropriate;

21 Police department policies and POST are beyond common knowledge. Thus, under *PM*  
22 *Group, supra*, and the other cases discussed herein, the above testimony should be allowed.

23 **E. Gender Bias**

24 1. That, under POST, certain conduct is prohibited;

25 2. That certain BPD policies were consistent with POST, and were therefore appropriate;

26 3. That certain BPD policies were inconsistent with POST, and were therefore  
27 inappropriate;

28 Police department policies and POST are beyond common knowledge. Thus, under *PM*

1 *Group, supra*, and the other cases discussed herein, the above testimony should be allowed.

2 **F. Ignored Standard IA Practice and Procedure**

3 1. Under standard internal affairs policies, the BPD has a duty to investigate allegations of  
4 discrimination and harassment, and to take corrective action when warranted.

5 2. What the BPD's investigatory obligations are under standard internal affairs policies,  
6 why those obligations are necessary, and how they are used in police department common practice;

7 4. What common police department customs and practices exist for making sure internal  
8 affairs policies are put into effect;

9 5. That the evidence shows that the BPD failed to comply with common customs and  
10 practices to make sure that internal affairs policies are put into effect; and

11 6. That the evidence shows that the BPD failed to meet its obligations under internal  
12 affairs policies, and how it failed to meet those obligations.

13 Police department customs and practices are beyond common knowledge. Thus, under *PM*  
14 *Group, supra*, and the other cases discussed herein, the above testimony should be allowed.

15 **G. Violation of BPD Mission Statement**

16 1. That violations of BPD Mission Statement is evidence of the BPD's failure to act and  
17 failure to train.

18 **H. Failure of Leadership**

19 1. That the police chief is accountable for the department.

20 2. Unprofessional conduct by a police chief tends to lead to discrimination and  
21 harassment throughout the department.

22 3. That there appears to have been unprofessional conduct by former Chief Stehr in  
23 reference to sexual harassment, gender bias, and discrimination.

24 ///

25 ///

26 ///

27 ///

28 ///

1 Even if this Court finds that one or more of the topics above would not be appropriate expert  
2 witness testimony, it would be an abuse of discretion to exclude all evidence by Drummond.

3 **Conclusion**

4 For all the foregoing reasons, Plaintiff respectfully requests that the Court deny Defendant's  
5 renewed Motion *in Limine* No. 6.

6  
7  
8 DATED: August 25, 2011

LAW OFFICES OF RHEUBAN & GRESSEN

9  
10 By: Steven M. Cischke  
11 Steven M. Cischke  
12 Attorneys for Plaintiff, Cindy Guillen-Gomez  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28



1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**PROOF OF SERVICE**

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles. I am over the age of eighteen and am not a party to the within action. My business address is 15910 Ventura Boulevard, Suite 1610, Encino, California 91436.

On August 25, 2011, I served a copy of the following document described as: PLAINTIFF'S OPPOSITION TO DEFENDANT'S RENEWED MOTION *IN LIMINE* NO. 6 TO EXCLUDE TESTIMONY OF OLIVER "LEE" DRUMMOND on the interested parties, through their respective attorneys of record in this action by placing a true copy thereof enclosed in sealed envelopes addressed as follows:

Lawrence A. Michaels  
Mitchell Silberberg & Knupp LLP  
11377 West Olympic Boulevard  
Los Angeles, CA 90064-1683  
Facsimile: (310) 312-3100  
Email: LAM@msk.com

Linda Miller Savitt, Esq.  
Ballard Rosenberg Golper & Savitt, LLP  
500 North Brand Boulevard, Twentieth Floor  
Glendale, California 91203  
Facsimile: (818) 506-4827  
Email: lsavitt@brgslaw.com

Carol Ann Humiston  
Senior Assistant City Attorney  
Office of the City Attorney  
275 East Olive Avenue,  
Burbank, California 91510-6459  
Facsimile: (818) 238-5724  
Email: chumiston@ci.burbank.ca.us

Robert Tyson, Esq.  
Burke, Williams & Sorensen, LLP  
444 South Flower Street, Suite 2400  
Los Angeles, California 90071  
Facsimile: (213) 236-2700  
Email: Rtyson@bwslaw.com

**XX**

**BY MAIL:** By placing a true copy thereof enclosed in a sealed envelope(s) addressed as above, and placing each for collection and mailing on that date following ordinary business practices. I am "readily familiar" with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the U.S. mail Postal Service in Los Angeles, California, in a sealed envelope with postage fully prepaid.

**XX**

**BY FACSIMILE:** Based on an agreement of the parties to accept service by facsimile transmission, I faxed the documents to the person(s) at the facsimile numbers listed above. The telephone number of the sending facsimile machine is (818) 815-2737. The sending facsimile machine issued a transmission report confirming that the transmission was complete and without error. A copy of that report showing the time of service is attached.

**XX**

**STATE:** I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on August 25, 2011 at Encino, California.

\_\_\_\_\_  
Daphne Johnson